DEPARTMENT OF STATE REVENUE
SUPPLEMENTAL LETTER OF FINDINGS NUMBER: 03-0347
CORPORATE INCOME TAX
For Years 1997, 1998, 1999, 2000, and 2001

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ISSUES

I. Gross Income Tax – Advertising fees

Authority: 45 IAC 1.1-1-2

Taxpayer protests the imposition of income tax on advertising fees collected from an Indiana limited partnership under the control of taxpayer.

STATEMENT OF FACTS

Taxpayer is an out-of-state corporation with retail activities outside Indiana. Taxpayer is the sole parent corporation of two other out-of-state corporations, one of which is a 99% owner in an Indiana limited partnership("partnership"), the other is a 1% owner in the same partnership. All retail operations for all of the affiliated companies are outside Indiana except for the Indiana limited partnership.

Taxpayer filed consolidated Federal income tax returns with all affiliated entities during the audit period. All state returns, including Indiana, were filed on a separate basis.

The auditor claims that taxpayer has income from co-op advertising fees charged to subsidiary companies, including the Indiana limited partnership. These fees are at the center of this protest as they were picked up on audit as being income for the taxpayer.

At the original hearing, the Department ruled that the income was taxpayer's income prior to taxpayer paying advertisers. Taxpayer requested a rehearing, which the Department granted.

I. Gross Income Tax – Advertising fees

DISCUSSION

Taxpayer claims that it does not receive fees for advertising from the Indiana limited partnership. Rather, taxpayer claims that the partnership reimburses taxpayer for the partnership's own

expenses that were previously paid for by taxpayer. Alternatively, taxpayer contends that the income was for services performed outside Indiana.

Taxpayer's position is that it contracts with third party vendors for advertising services for its various retail outlets. Some of these third parties are domiciled within Indiana, but most are outside Indiana. Taxpayer pays on said contract and subsequently receives a dollar-for-dollar reimbursement from the partnership along with a management fee that taxpayer claims and on which it pays income tax. Taxpayer claims that the only taxable income received in this situation is by the third party vendors who provide the advertising services.

Under 45 IAC 1.1-1-2(b), a taxpayer must meet a two-part test in order to qualify as an agent. Those parts are:

> (1) The taxpayer must be under the control of another. An agency relationship is not established unless the taxpayer is under the control of another in transacting business on its behalf. The relationship must be intended by both parties and may be established by contract or implied from the conduct of the parties. The representation of one (1) party that it is the agent of another party without the manifestation of consent and control by the alleged principal is insufficient to establish an agency relationship.
> (2) The taxpayer must not have any right, title, or interest in the money or property received from the transaction. The income must pass through, actually or substantially, to the principal or a third party, with the taxpayer being merely a conduit through which the funds pass between a third party and the principal.

Thus, taxpayer must indicate that it was under the control of the partnership in pursuing the advertising arrangements, that the taxpayer's arrangement was intended by the parties, and that taxpayer did not otherwise control the funds that it received for the claimed scope of the agency.

Here, if taxpayer's argument is as it indicates, then it is properly exempt as acting in an agency capacity. However, information sufficient to document its argument, such as a contract or other agreement demonstrating taxpayer's duties as an agent or lack of control over the advertising funds, is lacking. Taxpayer's alternative argument was previously addressed in a letter of findings and that finding will not be disturbed.

FINDING

The taxpayer is denied.

JR/PE/JS 051003